Supreme Court, U. S.
FILED
MAR 14 1972
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1185

O. H. DESHOTELS, JR., and FAY C. DESHOTELS,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

No. 30711 and No. 31093 CONSOLIDATED
In The Fifth Circuit Court Of Appeal

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

James Domengeaux
P. O. Box 3668
Lafayette, Louisiana

THE DAILY RECORD CORP., 310 Cotton Exchange Bldg., New Orleans, La. 70130

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No.

O. H. DESHOTELS, JR., and FAY C. DESHOTELS,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

No. 30,711 and No. 31,093 Consolidated In Fifth Circuit Court of Appeal

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

TO THE HONORABLES, THE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully pray that a writ of certiorari issue herein to review the judgment of the Fifth Circuit Court of Appeals entered and filed on the 21st day of October, 1971 denying petitioner's motion to dismiss the defendant's appeal from the judgment rendered in the District court of the Western District of the State of Louisiana.

OPINION BELOW

The Honorable Edwin Hunter of the Western District of Louisiana heard this case and rendered a written opinion therein. The opinion forming no basis of this application for certiorari will therefore be omitted. Formal judgment was rendered and signed on July 21, 1970, a full copy of same being reproduced herein as Appendix "A". On July 27, 1970, a new judgment was rendered and signed upon the application of the defendant herein. A full copy of this judgment is reproduced herein as Appendix "B". A motion for appeal was filed by the government attorney on the 23rd day of September, 1970, a full copy of the notice of appeal mailed September 22nd, but filed September 23rd is reproduced herein as Appendix "C". The judgment of the Fifth Circuit court of appeals denying said motion is set out in full, as follows:

> "APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
>
> BEFORE BELL, AINSWORTH AND GODBOLD, CIRCUIT JUDGES
>
> BY THE COURT:
>
> IT IS ORDERED THAT APPELLEES' MOTION TO DISMISS THE APPEAL FILED IN THE ABOVE STYLED AND NUMBERED CAUSE, IS HEREBY DENIED."

JURISDICTION

A judgment presubmitted to the defendants' attorney after rendition of opinion, was duly approved in writing, by the defendant's attorney before signing by the judge (see Appendix "D"). Thereafter, without formal motion, nor notice to plaintiff's attorney, defendant's attorney presented the judge with a judgment providing a change in interest to conform to existing law — the Judge signed the new judgment which vacated the first judgment (See appendix "B") In a similar case the Eighth Circuit Court of appeals refused to permit such a change and reversed the judgment of the lower court thereon, stating that such an error was not contemplated under Rule 60 (a). The Seventh Circuit Court of Appeals holds that "it is generally held that neither ignorance nor carelessness on the part of an attorney will provide ground for 60(b). The Fifth Circuit court of appeals in denying the motion to dismiss the appeal permits such relief under 60(b).

Petitioners invoke the provisions of 28 U.S.C. Section 1254 (1) as jurisdictional grounds for this application.

QUESTIONS PRESENTED

1. Can the amendment of a judgment under Title 28, Rule 60(b) extend the time in which to apply for an appeal?

2. Can a judgment previously approved by all parties litigant be set aside and amended by a new judg-

ment granted on application of one of the parties without notice to other party or parties litigant who have become vested with legal rights set out in first judgment? and,

3. Could such new judgment rendered without notice to adverse party, start a new time for taking an appeal?

LAW INVOLVED

The law involved herein is based upon the interpretation placed upon USCA Title 28 Rule 60, the pertinent part of which are as follows:

Rule 60, Relief from Judgment on order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight to omission may be corrected by the court at any time of its own initiative or on the motion of any party, and after such notice, if any, as the Court orders. During the pendency of an appeal, such mistake may be so corrected before the appeal is docketed in the appellate court and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes, Inadvertence; excusable neglect, newly discovered evidence; Fraud, etc. On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:

(1). Mistake, inadvertence, surprise or excusable neglect; (2) ... (3) ... (4) ... (5) ... or (6) any other reasons justifying relief from the operation of the judgment .... A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operations .... etc. Writs of coram nobis, coram vobis, audita querela, and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

CONCISE STATEMENT OF THE CASE.

O. H. Deshotels, Jr. and Fay C. Deshotels were assessed $43,085.57 for additional income taxes for the calendar year 1962. This amount was paid and the parties instituted suit in the Western District of Louisiana for a refund of the total amount. The District Court rendered its opinion granting plaintiffs full relief. A copy of the proposed judgment for signature was mailed to the attorney for the defendant who, by letter dated July 21, 1970, advised Judge Hunter "This office has received a copy of the July 17, 1970 letter to the court from Counsel for the plaintiffs in the captioned case, and we have examined the proposed judgment that accompanied that letter. In our opinion plaintiffs judgment conforms with the opinion of the court which was entered June 29, 1970. We therefore, have no objection as to the form or content of the proposed judgment". (See Appendix "D").

The judgment was signed on the 21st day of July, 1970. (See appendix "A").

On July 23rd, 1970, the attorney for defendant discussed this judgment with Judge Hunter, and in accordance with their conversation, submitted a corrected judgment to the Judge for signature and entry. (See appendix "B"). No notice nor copy of said letter or judgment was presented to plaintiffs' attorney and the new judgment was signed by Judge Hunter on July 24, 1970 (See appendix "B") This judgment provided also: "It is further ordered, adjudged and decreed that this judgment supersedes and replaces the judgment heretofore entered herein on the 21st day of July 1970, which latter judgment is hereby vacated and set aside". No notice prior thereto was sent attorney for plaintiffs. Thereafter on the 23rd day of September, the notice of appeal of the defendant was lodged in the District court. Plaintiff thereafter filed a motion to dismiss the appeal and this motion was denied. The motion to dismiss the appeal was docketed in the Fifth Circuit Court of appeal under Number 30711 and the appeal on the merit was docketed under Number 31093. A motion to consolidate the cases was granted. The Fifth Circuit court of appeal rendered judgment reversing the District court, said judgment being rendered November 3, 1971; however, on motion of plaintiffs, the judgment was revised to reverse in part only, this judgment was signed on the *4th* day of February, A.D., 1972, a copy of same is reproduced in appendix *"G"*. An application for additional time for filing a writ of certiorari was granted on the 22nd day of December, 1971 granting time until April 1, 1972 for filing of same,

under your docket number A-644. The copy of said order is reproduced as appendix *"H"*.

REASONS FOR ALLOWING THE WRIT.

1. The Supreme Court has not ruled on the interpretation of USCA 28 60 (b) with reference to (a) whether an amendment can nullify the first judgment and start a new prescription period for appeal. (b) Whether or not relief can be granted under 60 (b) without a motion and notice as prescribed in the rules; (c) Whether the Court of appeal can ignore that provision of 60 (b) which states that a motion under this subdivision does not affect the finality of a judgment or suspend its operations.

2. The Fifth Circuit court of appeals and the Eighth Circuit Court of appeals interpret 60(b) oppositely and this matter is a grave procedural question which should be set at rest by the United States Supreme Court.

In requesting this writ of certiorari, plaintiffs point out that the Court of appeals should have maintained its motion to dismiss for the following:

1. The Trial Court's judgment of July 27, 1970 was null and void and should be vacated and disregarded because same was entered in contravention to rule 59(e) of the Rules of Civil Procedure in that (1) no formal motion for amendment was made and presented to the presiding judge, (2) no notice was given opposing

counsel of a request or motion for amendment of judgment and (3) no hearing was had thereon.

2. That the judgment entered on the 27th day of July, 1970 was not in truth and in fact an "amendment of judgment" but was the rendition of a new judgment (this judgment "supersedes" and "replaces" the "vacated" and "set aside" the July 21, 1970 judgment) and could not have been rendered by the Court except under Rule 59(a) or 59(d) which in either case would require the previous ordering of a new trial by the Court to render a new judgment, and, there was no motion made for a new trial nor did the Court on its own initiative order a new trial, therefore said judgment is null and void, and of no effect.

3. That if the new judgment was rendered under Rule 60(a) same was null and void and of no effect because the mistake which was corrected was one of error or omission of attorney and not clerical error and therefore the correction was not authorized under this section.

4. That if the new judgment was rendered under Rule 60(b) it could not have begun a new time for filing of appeal because the Rule 60(b) specifically provides "a motion under this subdivision (b) does not affect the finality of a judgment or suspend its operations". Besides, there was no hearing and no evidence submit-

ted to support the new judgment. So it is clear, under this section, time for appeal was from July 21, 1970 judgment.

5. Judgment of July 21, 1970 was signed by the Court after reasons for judgment were filed; judgment conformed to reasons; judgment was submitted to Government counsel and was approved before submission to Judge (see Government Counsel's letter) then Judge signed same. This judgment was in nature of agreed judgment by court of proper jurisdiction, if erroneously entered, should have been appealed or reopened by new trial, neither of which Government moved for, therefore judgment of July 27, 1970 is ineffective.

6. In as much as Rule 60(b) provides "and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action", and no motion has been made for the new judgment under any of the rules of Civil Procedure, or independent action taken for relief, said judgment of July 27, 1970 was inoperative as same was not authorized.

In the case of Hoffman vs Celibrezze 405 Fed 833 (1969) the Eighth Circuit Court of Appeals, in a case quite similar to this reviewed a judgment amended by the Lower court, deleting the six percent interest in the judgment. In that case the trial court directed counsel to prepare an agreed upon proposed order

which would conform to the Court's mandate. The order was prepared, agreed upon by counsel, and signed by the court as prepared. The final judgment was filed February 6, 1967. The order directs payment of claim with six percent interest. No appeal was taken. More than four months later the Government filed a motion to modify the order by striking out the 'six per cent interest'. The motion was brief and did not state the statute or rule relied upon for relief and the sole ground for relief is stated:

> "It is respectfully pointed out that under Social Security Act, there is no provision for the payment of interest, and the law is well settled that in the absence of a statute authorizing the payment of such interest it is not recoverable against the United States. (cases cited)

Plaintiff filed resistance to the motion. No evidence in support of the motion was received. The motion was argued and submitted to the court. The court granted the relief. The court of appeals reversed the lower court. The court recognized that the error involved in this case is not the type of mistake contemplated under Rule 60(a).

Rule 60(b) provides for extraordinary relief which may be granted only on adequate showing of exceptional circumstances. It is generally held that neither ignorance nor carelessness on the part of an attorney will provide grounds for 60(b). Hudson v. Atchison T & S Fry Co. 7 Cir. 289. Thus government counsel cannot obtain relief by pointing to his carelessness or negligence.

It has been held that a judgment either awarding or failing to award interest cannot be modified as to this aspect by a 69(a) motion. Morse Boulger Destruction Co. vs Camden Fibre Mills, Inc. 3 Cir. 239 F. 2nd 382. Gray vs. Dukedom Bank 6 Cir. 216 Fed 2nd 108, 110.

> "By way of summary, we hold that the Government has neither pleaded nor proved that the interest provision was included in the judgment by inadvertance. There is no affidavit or testimony on the part of anyone representing the Government to the effect that the Government did not know that the interest provision was contained in the order which the Government had agreed to ... From the record before us, it appears that the interest provision was intentionally and deliberately included in the order with the knowledge, consent and approval of the Government. If the Government is of the view that error was committed in awarding judgment in the final judgment dated February 6, 1967, the normal and appropriate method of attack is a timely appeal. Under the circumstances of the case Rule 60(b) cannot properly be invoked for the purpose of extending the time for appeal which had already expired."

Dow v Baird 389 Fed 2nd 882, states:

> "To achieve the obviously desirable end of finality Rule 60 (a) limits the power of district

court to give relief from judgments of its own initiative only to correct clerical mistakes and errors arising from oversight or omission upon such notice, if any, as the Court may direct. There were no such errors in the original judgment in this case. Other errors in judgments, as for mistakes, inadvertances, excusable neglect, newly discovered evidence, fraud and so forth can be corrected only on motion and on such terms as are just. Thus the only errors in a judgment which a district court may correct of its own initiative are those sanctioned by Rule 60 (a) supra, that is ... formal errors arising from clerical mistakes and from oversights and omissions."

Gray v. Dukedom Bank 216 Fed. 2nd 108:

"Where the district court in its findings of fact and conclusion of law made no provisions for payment of interest on judgment, omission of provision with such findings and conclusions did not constitute "clerical mistake" within statute providing for correction of such mistakes and supplemental judgments awarding such interest on motion filed more than ten days after entry of original judgment was erroneous."

The Court held "the amended or supplemental judgment" of August 5, 1953 awarding interest was accordingly not authorized and must be reversed.

> "Courts possess the inherent power to correct errors in the records evidencing the judgment pronounced by the court so as to make them speak the truth actually reflecting that which was in fact done. They do not however, possess the power to correct an error by the court in rendering a judgment it did not intend to render and by such an order change a judgment actually but erroneously pronounced by the Court to the one of the Court intended to record. With these principles all courts are in accord."

The Clerical mistake under Rule 60(a) may be differentiated from the mistake or inadvertance referred to in Rule 60 (b) 1, upon the ground that the latter applied to errors or omissions committed by an attorney or by the Court which was not apparent of record. See 7 Moore Federal Practice 60.22 (2) at 230 2nd Ed.

The rule permitting district courts to relieve party from final judgment was not intended to be resorted to as alternative to review by appeal, except in compelling circumstances where justice requires that course and rule was not designed to afford machine whereby a grieved party could circumvent the policy evidenced by rule limiting time of appeal. Perrin v Aluminum Co. of America, 197 Fed 2nd 254, also Hill v Hawes, 320 U.S. 250, 64 S.Ct. 334, 88 L Ed 283.

From the preceding law cited, it is clear that the judgment entered July 24, 1970 could not have been rendered under Rule 60(a) of the Civil Procedure rules, as the error pointed out to the Judge was not a clerical error, as defined by law and as defined by 7 Moore Federal Practice 60.22 (2) at 230 2nd Ed.

Now, if the relief was granted under Rule 60(b) the judgment was not authorized because there was no formal motion for same and no evidence offered in support of the relief granted. But, even if the relief was properly granted, Rule 60(b) provides that the motion "does not affect, the finality of the judgment or suspend its operations." This rule also categorically states that "the procedure for obtaining any relief from a judgment shall be *by motion* as prescribed in these rules or by an independent action." Surely no independent action was instituted nor was there *any motion* or *hearing* or any evidence offered for the substituted judgment. The Court could not correct this judgment on its own initiative except under Rule 60(a) which of course, did not apply, or by the ordering of a new trial under Rule 59(d). No new trial was ordered before the signing of the new judgment so it was not authorized under Rule 59(b) or (d). If Rule 59(e) were utilized for this procedure, then the judgment was not authorized because no motion for same was served on appellees and no hearing was had nor was there any delay in signing the judgment.

The error complained of by the appellant in the first judgment was a serious error being an error of judgment of the court. This error could only be corrected

by appeal or through the medium of a new trial. The change affected the rights of the appellees and these rights were established by a competent judgment of a court having full jurisdiction. No change of these rights could be made without opportunity of appellees to contest same or to present evidence or briefs on the matter.

Finally the judgment, after the ruling of the Court became a decree by consent, after being approved by all parties and signed by the court. The error or neglect of the attorney could not change this judgment except after a hearing on notice with opportunity to present evidence and argument.

It is clear that the judgment signed July 24, 1970 was not authorized under any rules of procedure. It violated the adjudicated rights of the appellees without granting them the right to be heard. The judgment not being authorized, cannot be considered and therefore the computation of time for the appeal must begin from the only valid judgment i.e. that of July 21, 1970. Computing from the entry of this judgment, it was over sixty (60) days when the appeal was filed and was therefore too late.

WHEREFORE PETITIONERS RESPECTFULLY PRAY that a writ of certiorari issue in due course as provided for by law and the rules of this court.

Respectfully submitted,

James Domengeaux
Bob F. Wright
Gerald I. Hebert
O. H. Deshotels, III

ATTORNEYS FOR
PETITIONERS

CERTIFICATE

STATE OF LOUISIANA
PARISH OF

I, James Domengeaux, counsel for petitioner and a member of the bar of the United States Supreme Court, hereby affirm under oath that a copy of the foregoing petition for a writ of certiorari has been served on the parties hereto by mail, in a properly addressed envelope, postage prepaid, as follows, to-wit:

C. G. BARNETT
TAX DIVISION
UNITED STATES DEPARTMENT
OF JUSTICE
WASHINGTON, D.C. 20530

DONALD E. WALTER,
U.S. ATTORNEY
P.O. BOX 33
SHREVEPORT, LOUISIANA 71102
ATTORNEY FOR DEFENDANT

LOUISIANA, THIS __ DAY OF MARCH, A.D., 1972.

_____

SWORN TO AND SUBSCRIBED before me on this ____ day of March, 1972, at Lafayette, Louisiana.

_____

NOTARY PUBLIC

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

CIVIL ACTION No. 13,860

O. H. DESHOTELS, JR. and FAY C. DESHOTELS

versus

UNITED STATES OF AMERICA

JUDGMENT:

This non jury action for recovery of alleged overpayment of income taxes and interest, came on for trial before this court on December 12, 1969.

Present, Bob F. Wright, and Gerald I. Hebert, attorneys for plaintiffs; Charles G. Barnett, Attorney for the defendant.

When, after hearing the evidence, argument of counsel, said case was taken under advisement by the Court.

It is now, ordered, adjudged and decreed that there be judgment in favor of plaintiffs, O. H. DESHOTELS, JR. and FAY C. DESHOTELS, and against the United States of America, ordering the said defendant to pay to plaintiffs the sum of FORTY THREE THOUSAND,

EIGHTY FIVE & 57/100 ($43,085.57) DOLLARS, together with interest thereon at the rate of six percent (6%) per annum, from November 15, 1965, until paid.

JUDGMENT read, rendered and signed in Open Court in Lake Charles, Louisiana, on this 21st day of July, 1970.

/s/ Edwin F. Hunter, Jr.
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil No. 13,860

O. H. DESHOTELS, JR., and FAY C. DESHOTELS,
Plaintiffs,

versus

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This non jury action for recovery of alleged overpayment of income taxes and interest, came on for trial before this Court on December 12, 1969.

Present, Bob F. Wright and Gerald I. Hebert, attorneys for plaintiffs; Charles G. Barnett, Attorney for the defendant.

When, after hearing the evidence, argument of counsel, said case was taken under advisement by the Court.

IT IS NOW, ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, O. H. DESHOTELS, JR., and FAY C. DESHOTELS, and against the United States of America, ordering the said defendant to pay to plaintiffs the sum of FORTY THREE THOUSAND EIGHTY FIVE & 57/100 ($43,085.57) DOLLARS, together with interest thereon at the rate of six per cent (6%) per annum, as provided by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this judgment supersedes and replaces the judgment heretofore entered herein on the 21st day of July, 1970, which latter judgment is hereby vacated and set aside.

JUDGMENT rendered and signed in Lake Charles, Louisiana, on this 24th day of July, 1970.

/s/ Edwin F. Hunter, Jr.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil No. 13,860

O. H. DESHOTELS, JR., and FAY C. DESHOTELS,
Plaintiffs,

versus

UNITED STATES OF AMERICA,
Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the defendant, the United States of America, appeals to the United States Court of Appeals for the Fifth Circuit from the judgment entered herein on July 27, 1970.

DONALD E. WALTER
United States Attorney

/s/ C. G. Barnett
CHARLES G. BARNETT
Attorney, Tax Division
Department of Justice
7A06 Federal Building
Fort Worth, Texas 76102

Attorney for Defendant

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing notice of appeal has this 22d day of September, 1970, been made on counsel for the plaintiffs by mailing a copy thereof to Bob F. Wright, Esquire, P.O. Box 3668, Lafayette, Louisiana 70501.

/s/ C. G. Barnett
CHARLES G. BARNETT

APPENDIX D

FROM TAX DIVISION
UNITED STATES DEPARTMENT OF JUSTICE
7-A-06 FEDERAL BUILDING
Fort Worth, Texas 76102

July 21, 1970

JMW:BAD:CGBarnett:ap
5-33-430

Honorable Edwin F. Hunter, Jr.
United States District Court
Western District of Louisiana
P.O. Box 1337
Lake Charles, Louisiana 70601

Re: O. H. Deshotels, Jr., et ux v.
United States Civil No. 13,860
(DC WD Louisiana)

Dear Judge Hunter:

This office has received a copy of the July 17, 1970, letter to the Court from counsel for the plaintiffs in the captioned case, and we have examined the proposed judgment that accompanied that letter. In our opinion plaintiffs' judgment conforms with the opinion of the Court which was entered on June 29, 1970. We, therefore, have no objections as to form or content of the proposed judgment.

Sincerely yours,

Johnnie M. Walters
Assistant Attorney General
Tax division
BY:
Ben A. Douglas
Attorney in charge

cc: Bob F. Wright, Esquire
Lafayette, Louisiana 70501

Gerald I. Hebert, Esquire
Lafayette, Louisiana 70501

Donald E. Walter, Esquire
United States Attorney
Shreveport, Louisiana

APPENDIX E

DEPARTMENT OF JUSTICE
TAX DIVISION
7A06 Federal Bldg.
Fort Worth, Texas 76102

JULY 23, 1970

Please Reply in
Duplicate and
Refer to Initials
And Number

JMW:BAD:CGBarnett:ap
5-33-430

Honorable Edwin F. Hunter, Jr.
United States District Court
Western District of Louisiana
P.O. Box 1337
Lake Charles, Louisiana 70601

Re: O. H. Deshotels, Jr., et ux. v.
United States Civil No. 13,860
(DC WD Louisiana)

Dear Judge Hunter:

In accordance with a telephone conversation held this date between the Court and attorney Charles G. Barnett of this office, we submit herewith a corrected judgment for entry in this matter. The purpose of the

corrected judgment is to eliminate that provision of the judgment previously entered which decreed that interest on the judgment should run until the date of payment. The corrected judgment has been drawn to comply with the requirements of 28 U.S.C., Section 2411 (a).

Your consideration of this matter is appreciated.

Sincerely yours,

JOHNNIE M. WALTERS
Assistant Attorney General
Tax Division
/s/ Ben A. Douglas
BEN A. DOUGLAS
Attorney-in-charge

Enclosure

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30711

O. H. DESHOTELS, JR. and FAY C. DESHOTELS,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

No. 31093

O. H. DESHOTELS, JR. and FAY C. DESHOTELS,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

---

ORDER:

IT IS ORDERED that Appellees' motion to consolidate the above appeals in order that a single application for writ of certiorari can be filed in the United States Supreme Court is hereby GRANTED.

UNITED STATES
CIRCUIT JUDGE

APPENDIX G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 31,093

O. H. DESHOTELS, JR. and FAY C. DESHOTELS,
Plaintiffs-Appellees,
versus
UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

(February 4, 1972)

Before TUTTLE, WISDOM and INGRAHAM, Circuit Judges.

PER CURIAM: IT IS ORDERED that the Court's opinion of November 3, 1971, be amended by the addition of the following paragraph in lieu of the final paragraph of the slip opinion:

> Since the taxpayer did not acquire an economic interest in Pierce's minerals until 1962, his share of the 1962 recovery from Atlantic was taxable to him as a legal fee, and the fair market value of the interest acquired in 1962 was includable in his income for that year. The government set the fair market value of taxpayer's one-third (1/3rd) of seven-eights (7/8ths) of the mineral interest at $58,424.40 and the taxpayer was taxed on that amount. However, at the trial it was stipulated between the taxpayer and the Government that the accurate fair market value of the mineral interest was $45,800.00. Accordingly, the taxpayer is entitled to reimbursement of taxes, plus interest, on the difference between these evaluations, that is, on $12,624.40. The judgment of the lower court is therefore REVERSED insofar as it ordered the Government to refund taxes and interest over and above the taxes and interest on the taxes paid on the amount of $12,624.40, for the reasons stated above.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No.
October Term, 19

O. H. DESHOTELS, JR. and FAY C. DESHOTELS,
Petitioners,

versus

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including April 1, 1972.

/s/ POTTER STEWART
Associate Justice of the
Supreme Court of the United
States

Dated this 22nd
day of December, 1971.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 26 1972
MICHAEL RODAK, JR., CLERK

No. 71-1185

In the Supreme Court of the United States

OCTOBER TERM, 1971

O. H. DESHOTELS, JR., and FAY C. DESHOTELS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

GRANT W. WIPRUD,
WILLIAM K. HOGAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1185

O. H. DESHOTELS, JR., and FAY C. DESHOTELS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court are not reported. The order of the court of appeals denying the motion to dismiss the government's appeal (Pet. 2) is not reported. The opinion of the court of appeals is reported at 450 F. 2d 961.

JURISDICTION

The order of the court of appeals denying the motion to dismiss the government's appeal was entered on October 21, 1971 (Pet. 2). The judgment of the

court of appeals, relating both to the motion to dismiss and to the merits of the case, was entered on November 3, 1971, and amended on February 4, 1972 (Pet. App. 9a-11a). By order dated December 22, 1971, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including April 1, 1972. The petition was filed on March 14, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court had power to amend an erroneous judgment, where it acted, at the suggestion of government counsel, within ten days of the entry of judgment.

RULES INVOLVED

Rule 4 of the Federal Rules of Appellate Procedure and Rule 59(e) of the Federal Rules of Civil Procedure are set forth in the Appendix, *infra*, pp. 9-10. Rule 60 of the Federal Rules of Civil Procedure is set forth in the petition (pp. 4-5).

STATEMENT

On July 21, 1970, the trial judge signed a judgment (Pet. App. 1a-2a) awarding an income tax refund to petitioner [1] for 1962 of $43,085.57, "together with interest thereon at the rate of six percent (6%)

[1] References to "petitioner" are to O. H. Deshotels. Fay C. Deshotels is a party only because she filed a joint income tax return with her husband.

per annum, from November 15, 1965, until paid." Government counsel had signified that, in the light of the court's opinion, it had no objection to the form or content of the judgment (Pet. App. 5a-6a). The judgment was entered on July 22, 1970.

On the following day, July 23, 1970, government counsel wrote a letter (Pet. 7a-8a) to the trial judge, submitting a "corrected judgment for entry" and stating:

> The purpose of the corrected judgment is to eliminate that provision of the judgment previously entered which decreed that interest on the judgment should run until the date of payment. The corrected judgment has been drawn to comply with the requirements of 28 U.S.C., Section 2411(a).[2]

The corrected judgment (Pet. App. 2a-3a), signed by the trial judge on July 24, 1970, and entered on July 27, 1970, specified that petitioner should receive interest on the fund "as provided by law," and that "this judgment supersedes and replaces" the judgment entered on July 22, which "is hereby vacated and set aside."

On September 23, 1970, the government filed a notice of appeal from the judgment entered in the district court on July 27, 1970. Petitioner moved to

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[2] The cited statute provides that, in any judgment for refund of an overpayment of taxes, interest shall be allowed "to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue."

dismiss the government's appeal on the ground that the corrected judgment entered on July 27, 1970, was a nullity; that the original judgment of July 22 remained the final judgment; and, therefore, that the government's notice of appeal of September 23 was not filed within the 60-day period prescribed by 28 U.S.C. 2107. The court of appeals summarily denied petitioner's motion (Pet. 2), and it is this denial that is the subject of the petition for certiorari. Petitioner does not seek further review of the merits of the case, on which the Fifth Circuit in part reversed the judgment of the district court.

ARGUMENT

The decision below is correct. There is no conflict or any other basis for further review.

1. Rule 59(e) of the Federal Rules of Civil Procedure, Appendix, *infra*, p. 10, provides that: "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Rule 4(a) of the Federal Rules of Appellate Procedure, Appendix, *infra*, pp. 9-10, suspends the running of the time for filing a notice of appeal, when a timely motion is filed under Rule 59(e), until an order is entered granting or denying the motion. The correction of a provision in a judgment for interest is an alteration or amendment of the judgment within the meaning of Rule 59(e). *Spurgeon* v. *Delta Steamship Lines, Inc.*, 387 F. 2d 358 (C.A. 2); *Gray* v. *Dukedom Bank*, 216 F. 2d 108 (C.A. 6).

While Rule 59(e) does not expressly authorize a district court to alter or amend a judgment on its own motion, there are cogent reasons for ascribing to the court the power to do so, provided that action is taken within ten days of the entry of judgment. As stated in 6A Moore's *Federal Practice* (1971 ed.) § 59.12[4]:

> Rule 60(a) [F.R.Civ.P.] authorizes the court to correct clerical mistakes in judgments and errors therein arising from oversight or omission at any time on its own initiative. And Rule 59(d) authorizes the court to grant a new trial on its own initiative, provided it does so not later than 10 days after entry of the judgment. * * * The authorizations in Rules 60(a) and 59(d) for the court to act on its own motion are only declaratory examples of the general power of a court to act on its own initiative. And we conclude that the court has the power on its own motion to alter or amend a judgment, but if the alteration or amendment is of a substantial character, so that it does not fall fairly within the purview of Rule 60(a), that the court's action to be valid under Rule 59 must be taken by it not later than 10 days after the entry of judgment.

In a footnote to the foregoing passage, it is further noted that:

> Clearly it [the district court] has the power within the 10 day period, to grant a new trial on its own initiative under [Rule] 59(d) * * * and may do so for error of law. * * * The trial court could then grant a new trial because of legal error in the judgment and immediately

> thereafter grant a summary judgment, basing its action upon the prior record, and frame the new judgment exactly as it would have amended or altered the former judgment. The Rules [of Civil Procedure] should not be interpreted to require such circuitry.

In the case at bar, the district court acted, at the suggestion of government counsel, to correct the provision for interest in the original judgment of July 22, 1970. The action was taken well within ten days of the entry of the original judgment. The correction eliminated a provision for the payment of interest which was directly in violation of the governing statute. As petitioner himself concedes (Pet. 3), the correction was made to "conform to existing law • • •." Given these circumstances, the court of appeals properly held that the district court's entry of the corrected judgment was a valid exercise of its power to alter or correct judgments, as contemplated by Rule 59(e).

It has similarly been held that Rule 60(b), F.R. Civ.P., which authorizes a district court on motion to relieve a party from a final judgment on such grounds as mistake, newly discovered evidence and fraud, does not deprive the court of the power to act in the interests of justice where no motion has been made. *United States* v. *Jacobs*, 298 F. 2d 469 (C.A. 4). And in a case where a tardy motion under Rule 60(b) was made, but no detrimental reliance on the original judgment was shown, the Fifth Circuit has held that under "the compelling policies of

basic fairness and equity reflected by [Rule] 60(b), the Court had a duty to conform its judgment to the law as enacted by Congress." *Meadows* v. *Cohen*, 409 F. 2d 750, 753.

Generally, this Court too has sustained the power of federal courts to supersede judgments with new ones, citing 28 U.S.C. 452 and *Zimmern* v. *United States*, 298 U.S. 167. It also has recognized that, if a substantive change is involved, the time for appeal is tolled until the new judgment is entered. See *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206.

2. Petitioner erroneously asserts conflict (Pet. 9-10) between the decision below and that of the Eighth Circuit in *Hoffman* v. *Celebrezze*, 405 F. 2d 833. There the court held that relief under Rule 60(b) could not be granted, principally on the ground that the motion for such relief had been filed after the time for appeal had expired. The court also stressed that a consent decree was involved. In the instant case, on the other hand, the district court acted within a matter of days after the original judgment was entered, and the only form of consent involved was the government's consent to the entry of the original judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

GRANT W. WIPRUD,
WILLIAM K. HOGAN,
Attorneys.

APRIL 1972.

APPENDIX

Federal Rules of Appellate Procedure:

Rule 4. APPEAL AS OF RIGHT—WHEN TAKEN

(a) *Appeals in Civil Cases.* In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50 (b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings

of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Federal Rules of Civil Procedure:

Rule 59. NEW TRIALS: AMENDMENTS OF JUDGMENTS

* * * *

(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

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